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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY RONALD NELSON,

Defendant and Appellant.

E032628

(Super.Ct.No. FVA014909)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gus Skropos,
Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster,
Supervising Deputy Attorney General, and Gil P. Gonzalez, Deputy Attorney General,
for Plaintiff and Respondent.

A jury found defendant was guilty of one count of child abuse (Pen. Code, § 273a, subd. (a)) and one count of corporal injury to a child (Pen. Code, § 273d, subd. (a)). Also, the jury found allegations of great bodily injury as to each count were true (Pen. Code, § 12022.7, subds. (a) & (b)). The court imposed a nine-year prison term, consisting of concurrent four-year midterms with five-year enhancements.

Defendant appeals, contending the judgment should be reversed because the trial court erroneously denied his motion to suppress his statements to officers and the sentence for count 2 should be stayed pursuant to Penal Code section 654. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2001, defendant and his girlfriend, Jamie Crippen, lived together with their six-week-old son, Joseph Nelson, and a roommate, Dustin Lyman, in Fontana. When Crippen and Lyman went to work at 1:00 a.m. on March 11, defendant took care of the baby. When Crippen returned between 8:00 and 8:30 a.m., she noticed the baby was acting “fussy.” He would not eat and he vomited throughout the day. Crippen was concerned and asked defendant whether anything had happened that might explain the baby’s behavior. Defendant told her the baby had hit his head on defendant’s clavicle. Defendant did not tell her that he had dropped the baby and that the baby had stopped breathing.

The next day around 3:00 p.m., Crippen and defendant took their baby to see a doctor at Family Care in Fontana. The doctor believed the baby had suffered a head injury because one of his eyes was dilated. The doctor told defendant and Crippen to

take the baby to Arrowhead Hospital as he needed to be seen immediately. Defendant did not tell the doctor that he had dropped the baby and the baby had stopped breathing.

The administrative staff at Arrowhead Hospital did not believe the baby required immediate attention so he was not seen by a doctor for five to six hours. When the doctors finally saw the baby, they admitted him because of the severity of his injuries. A scan revealed bleeding around his brain. He suffered seizures, was not alert or active, and could no longer breathe on his own.

The following morning, the baby was transported to Loma Linda University Children's Hospital. Dr. Rebecca Piantini, a forensic pediatrician, examined the baby. She noticed bruises on the right side of his forehead and over his right ear. In her professional opinion, the baby had suffered massive head trauma commonly known as shaken-baby syndrome.

Fontana Police Officer Delatorre responded to Loma Linda Children's Hospital and spoke with defendant in the hospital waiting room. After Officer Delatorre advised defendant of his *Miranda*¹ rights, defendant agreed to provide a written statement. Defendant's written statement, dated March 14, 2001, stated he experienced four anxiety attacks in the three weeks preceding the incident due to work, bills, and the new baby. He described a technique called "free-hand bouncing" that he learned from his sister which he used to calm the baby. He would bounce the baby harder when he was frustrated. While they were watching television, the baby hit his head on defendant's

clavicle. The baby cried for two or three minutes, “but he was fine.” Officer Delatorre referred the case to the detective’s bureau.

Detective Stover from the child abuse unit responded to Loma Linda Hospital. The doctors told her they believed the loss of oxygen to the baby’s brain and the hemorrhaging resulted from shaken-baby syndrome. Detective Stover transported defendant to the police station for an interview. During most of his interview, his version of the incident was consistent with his written statement. However, he admitted that after the baby hit his head on defendant’s clavicle, defendant dropped him. When defendant picked up the baby, he was not breathing. So defendant shook him to wake him and get him to breathe. This was the first time defendant told anyone that the baby had been dropped and had stopped breathing. He had failed to convey this information to the baby’s mother or any of the medical personnel at the various medical facilities because he did not want the baby’s mother to leave him and he did not want to go to jail.

During trial, Dr. Piantini, a forensic pediatrician, testified the baby’s level of consciousness, vomiting, and CT scans showed massive head trauma bleeding into the brain that was specific to shaken-baby syndrome. Dr. Piantini also testified that advanced medical technologies available could have helped the baby significantly had defendant called for help.

[footnote continued from previous page]

¹*Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

1. Motion to suppress the statements made by defendant during his videotaped interview:

Defendant contends the trial court erred in admitting the statements he made during his videotaped interview at the police station because the prosecution failed to meet its burden of establishing they were voluntary. We disagree.

Before trial, defendant moved to suppress the challenged evidence on the ground that his statements were involuntary. At the hearing on the motion, Detective Stover testified that Crippen, defendant's girlfriend who is the baby's mother, told her, the detective, defendant got angrier when there was cursing during an argument. When Detective Stover asked Crippen for examples, Crippen responded with specific statements. Detective Stover found this information was helpful and it tailored her behavior during her interview of defendant.

Detective Stover began the interview by explaining she wanted some basic background information. Defendant replied he had "no problems with that," but also said he had not had "a cigarette this entire time." Detective Stover asked defendant's name, address, phone number, driver's license number, age, date and place of birth. Regarding his education, he said he had not "gone past the eleventh grade," but "[m]ost of the dean's [sic] told [him that he] should have been a lawyer, not a computer programmer. Because [he] was always fighting with other -- fighting for the rights of -- [¶] . . . [¶] . . . -- [his] rights, . . ." He was unemployed and had been laid off from his quality and

control job, inspecting truck loads. He had never been arrested as an adult.

When asked why defendant thought he was at the police station, he answered, “Because the story that I have given to everybody, does not add up to what is wrong with my boy.” When asked how he felt about talking to the detective, he answered, “I feel a little sad because I’d rather be at the hospital with him, but --” When Detective Stover asked how he was feeling overall, he said, “Tired.” Detective Stover explained she was investigating to determine whether the baby’s injuries were the result of child abuse. Although defendant agreed he previously had waived his *Miranda* rights, Detective Stover advised him of his rights and obtained his written waiver.

Defendant recounted the events of the incident in a manner consistent with his written statement. He also demonstrated how he “free-hand bounced” the baby. He said he was “a little more firm” because of stress due to the baby, not having a job and the accumulating bills. He did not know that shaking a baby could cause injury. When the baby would not stop crying, defendant would smoke, take deep breaths, and calm down as he had learned from anger management classes. The baby had banged his head on defendant’s collarbone and the clasp on defendant’s necklace might have caused the bruising on the baby’s ear. Defendant would never hit a child and he denied ever dropping the baby.

Detective Stover asked defendant if he wanted to know how severe the baby’s injuries were and he answered, “Please.” She said she did not know whether his son was “going to make it.” She said it would “help a hell of a lot” if the doctors knew what had

happened to the baby and there was “no way in hell” that he suffered the severe injuries by hitting his head on defendant’s clavicle or necklace. She asked, “If you can help me figure out what [caused the baby’s injuries] and you don’t fucking give me that information, what kind of father are you?” He answered he would be a “shitty one.” Detective Stover reassured defendant that she was not accusing him of intentionally hurting his son and, according to his wife, he was a good father.

Detective Stover increased the intensity of the questioning, but defendant continued to deny shaking the baby. Detective Stover used explicit language as a result of Crippen’s information that defendant got angrier when curse words were used during arguments. Defendant began crying and said that after the baby’s head hit defendant’s clavicle, defendant stood up. But he did not “have a good grip” on the baby and the baby “fell backwards, and tumbled to the floor.” Crying and saying he did not “want to be a bad dad,” defendant said the baby “fell out” of his arms and probably landed on the remote control. Detective Stover told defendant his “child’s head is mush,” and she knew “somebody shook the damn child.” Eventually, defendant said, “Okay fine! I shook him! I shook him! What else do you want me to tell you? I did not shake him!” At that point, Detective Stover said she was going to set up a polygraph test and left the room.

Detective Mackey entered and helped defendant regain his composure. Taking deep breaths while crying, defendant said he did not want his wife to know that he had dropped the baby. But, after he dropped the baby, the baby stopped breathing and turned

a bright red. Defendant “tried to shake him awake” to “get him to breathe.” When he started breathing, defendant put him in the bassinet and took a time out. Defendant said he had never shaken the baby in anger, but he shook the baby “very violent[ly].” After saying, “Let me make this a little easier to understand --” defendant explained the baby had fallen and was not breathing. Defendant was telling the baby to breathe while “shaking him briskly,” “shaking him pretty hard. Try to wake him up to get him to breathe.”

After reviewing the two-hour videotape, the court raised two concerns about the officers’ conduct during the interview. First, the court noted the officers denied defendant’s request for a cigarette on more than one occasion. Second, the court noted its surprise at the language the officers used. However, the court denied defendant’s motion. It noted that Detective Stover had read defendant his rights and defendant signed a document indicating he understood the rights he was waiving. He remained calm throughout the first hour of the interview. When he did begin to lose his composure during the second hour, he used anger management techniques and continued to provide rational answers to the officers’ questions. Based on these factors, the trial court ruled defendant’s admissions were voluntary and admissible at trial.

“To determine whether a statement was voluntary or coerced, we examine the totality of the circumstances.” (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) “Relevant are ‘the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity’ as well as ‘the defendant’s

maturity [citation]; education [citation]; physical condition [citation]; and mental health.’ [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 635, 660.)

“On appeal, the trial court’s findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court’s finding as to the voluntariness of the confession is subject to independent review. [Citations.] In determining whether a confession was voluntary, ‘[t]he question is whether defendant’s choice to confess was not “essentially free” because his will was overborne.’ [Citation.]” (*People v. Massie* (1998) 19 Cal.4th 550, 576.) The People have the burden of demonstrating voluntariness by a preponderance of the evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) Although this issue is independently reviewed on appeal, appellate courts “give great weight to the considered conclusions” of lower courts. (*Whitson, supra*, at p. 248, internal quotation marks omitted.) Furthermore, we do not reweigh credibility on appeal and defer to the fact finder’s resolution of credibility. (*Ibid.*) Thus, the trial court’s findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. (*Massie, supra*, at p. 576.)

After an independent review of the record, we agree with the trial court that neither the environment nor the detective’s tactics were coercive and that defendant’s confession was voluntary under the totality of the circumstances. While at the hospital and before defendant provided a written statement about the incident, he was advised of his rights and waived them. The videotaped interview at the police station began at 2:56 p.m. and lasted approximately two hours. (See *People v. Bradford, supra*, 14 Cal.4th at

p. 1041 [Bradford's confession voluntary despite having been in custody for 11 hours].) Defendant willingly responded to Detective Stover's questions after he orally waived his *Miranda* rights for a second time and signed a written waiver. (See *People v. Bradford, supra*, 14 Cal.4th at p. 1045 [fact that a defendant was repeatedly informed of and expressly waived his constitutional rights supports a finding of voluntariness].) In addition, defendant made the incriminating admission that he had shaken the baby after about an hour. He was 22 years old and had an 11th grade education. Although he complained once at the beginning of the interview that he was tired, the record shows he understood the questions, was sufficiently alert to repeatedly deny shaking the baby, used emotional management techniques, and responded intelligently to the questions.

Detective Stover's admittedly aggressive questioning and her denial of defendant's request for cigarettes did not rise to the level of coercive conduct tending to produce an involuntary and unreliable statement. The record shows that defendant asked for a cigarette twice before he admitted dropping, roughly bouncing, and shaking the baby "pretty briskly." Once at the very beginning of the interview defendant asked, "No cigarette? I was ahh - Oh, man. I haven't had a cigarette this entire time." Again as Detective Stover was leaving to get a doll, defendant asked, "Can I seriously smoke a --" But after Detective Stover refused, defendant replied, "Alright." Furthermore, Detective Stover did not employ trickery; she truthfully told defendant that her purpose in questioning him was to determine whether the baby's injuries were the result of abuse. While she appealed to defendant's responsibilities as a father by telling him that he had

information which might help the doctors treating the baby, her statements merely pointed out the potential benefit that could result from his honesty. (See *People v. Ray* (1996) 13 Cal.4th 313, 340 [permissible interrogation tactics include discussing the natural advantages and consequences that may result from the defendant's truthful responses to questioning].) Detective Stover never threatened him, never promised him leniency, and never encouraged him to confess to minimize his punishment.

Defendant's concern for his son's condition probably affected his emotional state at the time of the interview and he became more emotional as the interview progressed. But his presence of mind in consistently limiting his complicity when confronted with the details of his son's severe condition demonstrates that his will was not overborne. He began the interview rationally selecting the information he wished to provide and did not begin to cry until Detective Stover told him it was possible that the baby would not recover. He became increasingly distraught as he revealed his responsibility for the baby's injuries, but that probably was due to his guilt for concealing information which could save his baby's life. And, he was composed when the interview ended and the officers placed the handcuffs on him.

As the totality of the circumstances shows that defendant's admissions were not provoked by improper coercion, the trial court did not err in denying his motion to suppress his videotaped statement at the police station.

But, even if the trial court erred in finding defendant's statements were voluntary, the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386

U.S. 18, 24; see also *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) All of the circumstantial evidence presented in the prosecutor's case showed defendant caused the baby's injuries.

Crippen, defendant's girlfriend and the baby's mother, testified that while Dustin Lyman shared their apartment, she and Lyman left together for work at 1:00 a.m. and defendant cared for the baby. When she returned, the baby was not normal; he was groggy, he would not eat and he threw up. While they were at the hospital, defendant asked the hospital personnel to please take care of the baby because there was an emergency. Dr. Piantini, a forensic pediatrician, testified the baby's level of consciousness, vomiting, and CT scans showed massive head trauma bleeding into the brain that was specific to shaken-baby syndrome. Defendant's written statement, which he has not challenged, established that his anxiety caused him to bounce the baby harder than usual because he could not calm the baby. Thus, even without defendant's admissions at the police station, the only reasonable explanation was that defendant caused the baby's injuries. Consequently, any error in admitting defendant's videotaped statement at the police station was harmless beyond a reasonable doubt.

2. Concurrent sentences:

Defendant contends the sentence for count 2 should be stayed pursuant to Penal Code section 654. We disagree.

Penal Code section 654 prohibits multiple punishment for offenses that are part of an indivisible course of conduct based on a single criminal objective. (*People v. Latimer*

(1993) 5 Cal.4th 1203, 1211.) The focus of this rule is whether the defendant acted pursuant to a single intent and objective. (*Ibid.*) The resolution of this question is one of fact and the sentencing court's finding will be upheld on appeal if it is supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

In this case, count 1 alleged that defendant committed the crime of child abuse in violation of Penal Code section 273a, subdivision (a), in that he “did willfully and unlawfully, under circumstances likely to produce great bodily harm and death, injure, cause, and permit a child, Joseph Ronald Nelson, to suffer and to be inflicted with unjustifiable physical pain and mental suffering, and, having the care and custody of said child, injure, cause, and permit the person and health of said child to be injured and did willfully cause and permit said child to be placed in such situation that his/her person and health was/were endangered.”

Count 2 alleged that in violation of Penal Code section 273d, subdivision (a), defendant “did willfully and unlawfully inflict cruel and inhuman corporal punishment and injury, resulting in a traumatic condition, upon a child, to wit, Joseph Ronald Nelson.”

During trial, the prosecutor explained to the jury that each count was “a separate occurrence . . . almost in the reverse. Count 2 is a corporal injury to a child. This is alleged as the shaking of [the baby]. . . . [¶] Count 1 is allege[d] as child abuse. This is the failure of the defendant for as long as you determine that he failed to tell anyone what happened, lie[d] about it, and further endanger[ed] that child. . . . Because that child, by

not giving the aid that it needed. Two different counts. You can find him guilty of the shaking and not guilty of the abuse. Depends on how you do it. There are two different counts.”

In *People v. Braz* (1997) 57 Cal.App.4th 1, the defendant was convicted of two counts of child endangerment pursuant to Penal Code section 273a - one count for actually abusing a child and the other for failing to seek medical help for the child’s resulting injuries. (*People v. Braz, supra*, 57 Cal.App.4th at pp. 9-12.) The trial court imposed consecutive sentences and the defendant appealed, arguing in part that the court erred by failing to stay punishment for one count of child endangerment. (*Id.* at pp. 4, 12.) The reviewing court rejected the argument, stating substantial evidence established that the defendant was an active participant in the physical abuse and she subjected him to a separate and distinct risk of harm by not obtaining medical help for his serious injuries. (*Id.* at pp. 11-12.) “[T]he failure to obtain help following an injury of this severity, inferentially to avoid detection of the initial crime, is a separate criminal objective.” (*Id.* at p. 12.)

Here, too, substantial evidence established that defendant physically abused the baby and then subjected him to a separate and distinct risk of harm by concealing the injuries. The videotape of defendant’s interview at the police station, his written statement, Dr. Piantini’s expert testimony, and Crippen’s testimony excluding herself and Lyman as potential sources of the baby’s injuries provided substantial evidence to support a finding that defendant physically injured the baby. Defendant’s videotaped

interview at the police station established that he concealed the baby's injuries from the baby's mother and the doctors because he did not want the baby's mother to leave him and he did not want to go to jail. Dr. Piantini's expert testimony supported a finding that defendant endangered the baby by concealing his injuries because the advanced medical technologies available could have helped the baby significantly had defendant called for help.

Thus, the trial court's imposition of concurrent sentences is supported by substantial evidence establishing that defendant committed separate and distinct acts on different dates for different purposes.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

WARD

J.

KING

J.